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No. 87-905

In the Supreme Court of the United States

OCTOBER TERM, 1987

SAMI ANNABI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecution of petitioner violated the Double Jeopardy Clause or petitioner's prior agreement pursuant to which petitioner pleaded guilty to a different charge.

2. Whether the district court erred in admitting the testimony of an expert witness who interpreted intercepted conversations.

3. Whether the evidence was sufficient to support petitioner's conviction on the conspiracy count.

4. Whether the district court erred in denying petitioner's motion to sever his trial from that of his co-defendants.

5. Whether petitioner received effective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A80) is reported at 824 F.2d 1294. An earlier opinion of the court of appeals (Pet. App. A81-A86) is reported at 771 F.2d 670.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1987. A petition for rehearing was denied on August 18, 1987 (Pet. App. A87). On October 13, 1987, Justice Marshall granted an extension of the time within which to petition for a writ of certiorari to and including November 16, 1987. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846 (Count 1); engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 3); five substantive counts involving distribution of heroin and possession of heroin with intent to distribute it, all in violation of 21 U.S.C. 841 (Counts 7 and 11-14); two counts of using a telephone to facilitate a narcotics transaction, in violation of 21 U.S.C. 843(b) (Counts 22 and 23); and one count of illegally receiving a firearm, in violation of 18 U.S.C. 922(h) (Count 25).[1] He was sentenced to concurrent 25-year terms of imprisonment on each of Counts 1, 3, 7, and 11-14; shorter concurrent terms of imprisonment on each of Counts 22, 23, and 25; and concurrent six-year special parole terms on each of Counts 7 and 11-14. He was also assessed fines totaling $185,000.[2] The court of appeals reversed the convictions and sentences on Counts 22 and 23 (thus reducing the total fine to $145,000) but otherwise affirmed.

1. Petitioner's convictions resulted from a large-scale conspiracy to import heroin from the Middle East and distribute it in United States. The conspiracy originated in mid-1982, when petitioner obtained financing for a trip to the Middle East to import heroin. Funds for that trip came

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[1] Petitioner was acquitted at trial on two additional counts of using a telephone to facilitate a narcotics transaction (Counts 20 and 21). One additional count charging petitioner with carrying a firearm during a crime of violence (Count 26) was dismissed.

[2] Petitioner's co-defendants were convicted of numerous offenses. An appendix to the opinion of the court of appeals sets forth the convictions of all the appellants in that court (Pet. App. A78-A80).

from Basil Cannata, an accomplice who testified for the government at petitioner's trial, and from petitioner's co-defendant Anthony P. Restaino. On that and subsequent trips, petitioner imported or arranged to import several kilograms of heroin. Pet. App. A9.

Petitioner and his brother, Nedam Annabi, were arrested at Kennedy Airport in New York on November 23, 1982, while smuggling approximately four kilograms of heroin into the United States. Both Annabis were then charged with conspiracy to import heroin, in violation of 21 U.S.C. 963; importation of heroin, in violation of 21 U.S.C. 952(a); and possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner subsequently pleaded guilty to the importation count. At the same time, in return for petitioner's agreement to cooperate with the Drug Enforcement Administration (DEA), the United States Attorney for the Eastern District of New York agreed to dismiss the remaining two counts against petitioner and his brother. As a result of that unwritten agreement and petitioner's subsequent testimony for the government in three prosecutions in the Southern District of New York, petitioner's sentence of incarceration on the importation count was reduced to probation. Pet. App. A9-A10.

Despite his arrest, conviction, and agreement to cooperate with the government, petitioner continued to traffic in heroin. Following his arrest and conviction, however, he delegated many operational tasks to other members of the conspiracy. Shortly after his arrest in 1982, petitioner sent his wife, Maysoun Annabi, and another woman to Syria to maintain relations with Abu Hamadah, one of his heroin suppliers (Tr. 1661-1663). During the trip Maysoun Annabi also met with another of petitioner's suppliers, co-defendant Hassan Maktabi (Tr. 1873-1874). Petitioner sent his brother-in-law, Hani Fraih,

to deliver cash to Abu Hamadah in Syria (Tr. 836-839, 1455-1462). Petitioner also enlisted Jordanian military personnel serving as sky marshals on Royal Jordanian Airlines flights to serve as drug couriers (Tr. 647-660, 741-743, 4423-4425, 4426). Co-defendants Elias Abdouch, Antwan Abdouch, and Angeel Abdouch, among others, acted as couriers in petitioner's operation (Tr. 4002).

Petitioner also had dealings with a third supplier, Sirop Siropian, who was indicted but never apprehended. Siropian came to petitioner's home to test a sample of heroin that Siropian had smuggled into the country (Tr. 758-762). Later, after Siropian was arrested in Boston on another offense, petitioner helped him obtain a false passport and leave the country (Tr. 4480-4483).

At some point after entering his guilty plea in the Eastern District of New York, petitioner himself became actively involved in the distribution of heroin. He had numerous direct dealings with co-conspirator Murad Nersesian, including a sale of 1300 grams of heroin. He worked with co-defendants Peter Pazienza and Dennis Meade in attempting to find additional customers for the imported heroin. He made 15 to 20 direct sales of heroin to Jorge Luis Audinot, who later testified on behalf of the government. Tr. 4178, 4848-4855, 4729. The scheme ended on December 18, 1984, when most of the defendants, including petitioner, were arrested (Pet. App. A11).

2. After he was indicted in the Southern District of New York, petitioner moved to dismiss the counts of the indictment charging him with conspiring to distribute heroin and conducting a continuing criminal enterprise (Counts 1 and 3). He argued that his indictment on those counts violated the unwritten plea agreement he had reached with the United States Attorney for the Eastern District of New York following his 1982 indictment in that

district. After a hearing, the district court rejected that contention.

On interlocutory appeal, the court of appeals affirmed (Pet. App. A81-A86).[3] The court held that a plea agreement binds only the United States Attorney who enters into that agreement, not the United States Attorney for a different district. Thus, in the absence of evidence that "the agreement contemplates a broader restriction," the court held that petitioner's prosecution in the Southern District of New York did not violate the plea agreement entered into in the Eastern District (*id.* at A85). The court of appeals also rejected petitioner's claim that his current prosecution violated the Double Jeopardy Clause. It held that petitioner and his brother were never put in jeopardy on the 1982 indictment (*ibid.*). The court added, however, that petitioner would have no double jeopardy claim even if he had been put in jeopardy on the earlier charges, because the counts of the current indictment charging him with conspiracy and engaging in a continuing criminal

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[3] The court of appeals followed its own prior decision in *United States* v. *Abbamonte*, 759 F.2d 1065, 1070-1071 (2d Cir. 1985), in permitting the interlocutory appeal from denial of the motion to dismiss based on the prior plea agreement (Pet. App. A84). No other circuit permits such an interlocutory appeal. See *John Doe Corp.* v. *United States*, 714 F.2d 604, 606 (6th Cir. 1983); *United States* v. *Bird*, 709 F.2d 388, 392 (5th Cir. 1983); *United States* v. *Rosario*, 677 F.2d 614, 615 n.4 (7th Cir.), cert. denied, 459 U.S. 867 (1982); *United States* v. *Brizendine*, 659 F.2d 215 (D.C. Cir. 1981); *United States* v. *Eggert*, 624 F.2d 973, 975-976 (10th Cir. 1980); *United States* v. *Solano*, 605 F.2d 1141, 1142-1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); see also *Heike* v. *United States*, 217 U.S. 423, 430-433 (1910); *United States* v. *MacDonald*, 435 U.S. 850, 860 & n.7 (1978); *United States* v. *Alessi*, 544 F.2d 1139, 1143-1152 (2d Cir.) (Friendly, J.) (questioning Second Circuit rule allowing interlocutory appeal), cert. denied, 429 U.S. 960 (1976).

enterprise covered conduct extending two years beyond the period covered by the dismissed charges (*ibid.*).

3. At trial, the government introduced testimony from three wiretaps. Two of the wiretaps were placed on the telephones of individuals who were not defendants in this proceeding, and none of the defendants was a party to any of the conversations intercepted on those two wiretaps. The third wiretap was placed on petitioner's telephone. Pet. App. A18, A20. At the close of its case-in-chief, the government offered the testimony of DEA Agent John Nolan. Agent Nolan had 15 years' experience, had participated in 125 wiretap investigations, and had qualified on three prior occasions as an expert on the use of codes by narcotics traffickers (*id.* at A23-A24). Agent Nolan testified about the terms of speech that narcotics dealers commonly use in their conversations (Tr. 6362-6365). Nolan also testified that certain words or phrases in the conversations intercepted in this case were narcotics-related (Tr. 6375-6513). In accordance with a ruling of the district court, however, Nolan limited his testimony on direct examination to the question whether a conversation was "narcotics-related" as opposed to "heroin-related" or "cocaine-related," unless some intrinsic evidence, such as the prices mentioned by the parties to the conversation, provided a basis to infer that the conversation related to heroin (Pet. App. A24).

On cross-examination, defense counsel asked Nolan to identify whether specific conversations referred to heroin or cocaine. In response to those inquiries, Agent Nolan stated his opinion that certain of the conversations related specifically to heroin. On the third day of Nolan's testimony, the district court intervened to limit Nolan's testimony to the question whether a given conversation was "narcotics-related." In addition, the district judge instructed the jury that it could consider Nolan's testimony

only as it related to the use and interpretation of codes in narcotics transactions, but not as it related to what drug was involved. Pet. App. A24-A25.

4. In an extensive opinion, the court of appeals affirmed petitioner's convictions for conspiracy, continuing criminal enterprise, distribution and possession with intent to distribute, and illegal receipt of a firearm (Pet. App. A1-A80). First, the court rejected petitioner's contention that the evidence was insufficient to support the jury's finding that he was a party to a single conspiracy to distribute heroin (*id.* at A12-A14). The court specifically held that evidence of acrimony among the conspirators did not demonstrate that a conspiracy could not have existed (*id.* at A14).

The court also rejected petitioner's claim that he had been prejudiced by the district court's refusal to sever his trial from that of his co-conspirators because the evidence against him was so strong that it led his co-defendants to assume his guilt before the jury in order to dissociate themselves from petitioner. Although the court acknowledged that the district court had a continuing obligation to grant a motion for severance if prejudice arose during trial, it held that the record did not show prejudice in petitioner's case. Pet. App. A14-A18.

The court of appeals further held that the district court had not erred by admitting evidence gleaned from government wiretaps (Pet. App. A18-A23). In addition, the court decided that petitioner had not been denied due process by the trial court's decision to allow Agent Nolan to testify as an expert witness concerning the meaning of terms used by petitioner and his co-conspirators in various intercepted conversations. In this respect, the court of appeals noted that the district court had carefully limited the testimony of the agent and had instructed the jury that the agent's expertise was limited to specific subjects. *Id.* at A23-A27.

The court also reaffirmed its earlier conclusion that the current prosecution did not violate petitioner's rights under the Double Jeopardy Clause or his prior plea agreement (*id.* at A51-A54). Finally, the court concluded that petitioner had not been denied the effective assistance of counsel (*id.* at A54-A58). The court observed that "[t]he evidence against [petitioner] was overwhelming" (*id.* at A57), and it quoted with approval the district court's observation, outside the presence of the jury, that "there was 'more than sufficient evidence to convict him twelve times over' " (*id.* at A57-A58).

ARGUMENT

1. Petitioner presents two related claims arising out of his 1982 indictment in the Eastern District of New York (Pet. 21-28). First, he contends that his conviction in the present case violates the Double Jeopardy Clause. Second, he contends that the government secured his conviction in this case by violating the plea agreement between petitioner and the United States Attorney's Office for the Eastern District of New York. Both arguments are without merit and were properly rejected by the court below.

a. Petitioner contends that his indictment and conviction for conspiring to distribute heroin and for engaging in a continuing criminal enterprise in the present case violate the Double Jeopardy Clause because the conspiracy that supported those two charges embraced the scheme that supported the 1982 indictment of petitioner and his brother. The charges at issue in the 1982 indictment, however, were different from the charges at issue in this case (see Pet. App. A83-A84). Thus, no count in the present indictment was subject to dismissal on res judicata or double jeopardy grounds.

Under the 1982 indictment, petitioner was convicted of one substantive count of importation of heroin. That conviction, however, did not give petitioner a valid double jeopardy defense to a charge of conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946). Nor, given that petitioner continued his illegal activities after that conviction, did it give him a valid double jeopardy defense to a charge of operating a continuing criminal enterprise. *Garrett* v. *United States*, 471 U.S. 773, 791-792 (1985). Moreover, the two counts of the 1982 indictment that were dismissed pursuant to petitioner's plea agreement charged petitioner with a substantive importation offense and an importation conspiracy, in violation of 21 U.S.C. 952(a) and 963. He was not charged with either of those offenses in the later indictment; rather, in the present case petitioner was charged with, among other things, substantive distribution counts and a conspiracy to distribute. The dismissal of the importation and importation conspiracy counts in the 1982 indictment thus had no effect on any of the charges in the present case.

b. Petitioner also maintains that the government violated his prior unwritten plea agreement in two distinct ways: by prosecuting him on Counts 1 and 3 of the present indictment, and by making use of information that he gave the government pursuant to his cooperation obligation under that plea agreement.

The government did not violate petitioner's plea agreement by bringing Counts 1 and 3 of the present indictment. Nothing in the prior plea agreement barred the government from bringing other charges against petitioner, particularly since petitioner resumed his illegal activities after entering the plea agreement in the other case. Only if the plea agreement gave petitioner a lifetime license to continue his illegal activities could that agreement be deemed to preclude the bringing of the charges in this case. And

there is no evidence in the record to show that the United States Attorney made any such extravagant promise.[4]

Nor did the government make use of immunized communications in any way that would justify the reversal of petitioner's convictions. Petitioner's only specific allegation that any such forbidden use occurred is that the government used his statements to support an application to place a wiretap on his telephone (Pet. App. A54; Pet. 23-24). Even assuming arguendo that that allegation is both legally and factually well grounded, petitioner would not be entitled to relief, for the court of appeals correctly concluded that the wiretap application was based on enough independent information to establish probable cause (Pet. App. A21-A22, A54). Petitioner offers nothing but assertion to challenge this conclusion. There is accordingly no "immunity" issue in this case that warrants review by this Court.

2. Petitioner also contends (Pet. 28-37) that the district court improperly admitted conversations intercepted by electronic surveillance and that the district court erred by allowing Agent Nolan to testify as an expert regarding the contents of the intercepted conversations.[5]

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[4] For this reason, it is entirely immaterial whether the unwritten plea agreement bound only the United States Attorney for the Eastern District of New York, or the Southern District as well. There is accordingly no need for this Court to grant certiorari in this case in order to decide whether "one U.S. Attorney can file charges against a defendant following dismissal of the charges pursuant to a plea agreement, even though it would breach the agreement if the charges were filed by the U.S. Attorney who made the agreement" (Pet. 28).

[5] Petitioner also asserts, almost entirely without supporting citation or reasoning, that the wiretaps themselves "were of questionable legality, unsupported by probable cause, procedurally deficient and otherwise objectionable in various respects" (Pet. 30). Petitioner's only specific complaint is that government agents failed "to follow the

More specifically, petitioner contends that Agent Nolan's testimony "answered the ultimate questions of fact and usurped the jury's function" (*id.* at 29). Federal Rule of Evidence 704(a), however, explicitly provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Moreover, a district court's determination to admit expert testimony should stand unless that determination is manifestly erroneous. *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962). The operations of drug dealers are a proper subject for expert testimony. *United States* v. *Ginsberg*, 758 F.2d 823, 830 (2d Cir. 1985); *United States* v. *Hajal*, 555 F.2d 558, 568 (6th Cir.), cert. denied, 434 U.S. 849 (1977). Furthermore, the courts of appeals have long approved expert testimony on the use of code words in narcotics transactions. See, *e.g.*, *United States* v.

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minimization requirements of 18 U.S.C. section 2518(5)" (Pet. 30). That challenge to the admission of the wiretaps, however, was lost when petitioner failed to raise it in a timely fashion in the trial court, waiting until after trial to make the argument for the first time (see Pet. App. A22). In any event, the challenge is without merit. The court of appeals considered petitioner's minimization challenge in light of the factors set forth in *Scott* v. *United States*, 436 U.S. 128, 140-141 (1978), and concluded that the government surveillance agents had acted reasonably. The court reasoned that "[t]he instant case involved factors such as the presence of ambiguous or coded language, a conspiracy thought to be widespread, and the fact that the phone tapped was located in the residence of a person thought to be the head of a major drug ring" (Pet. App. A23). On that basis, the court declined to conclude that "in monitoring the intercepted conversations, the investigators did not 'observe reasonable safeguards against excessive intrusion' " (*ibid.* (quoting *United States* v. *Terry*, 702 F.2d 299, 312 (2d Cir.), cert. denied, 461 U.S. 931 (1983))). Petitioner has not pointed to any reason to disturb that or any other aspect of the lower courts' rulings.

Borrone-Iglar, 468 F.2d 419, 421 & n.4 (2d Cir. 1972), cert. denied, 410 U.S. 927 (1973); see also *United States* v. *Alfonso*, 552 F.2d 605, 618 (5th Cir.) (expert testimony interpreting gambling jargon admissible), cert. denied, 434 U.S. 857 (1977). Accordingly, the district court did not improperly admit Agent Nolan's testimony.

3. Petitioner also contends that the evidence fails to support the jury's conclusion that petitioner was a member of the single conspiracy charged in Count 1 (Pet. 38-53). In support of this contention, petitioner enlists the reversal by the court of appeals of two of his convictions for using a telephone to facilitate a narcotics transaction; an asserted lack of evidence showing the involvement of petitioner's brother Nedam Annabi in the conspiracy; the diverse nationalities of the conspirators; asserted doubts as to the credibility of some of the government's witnesses; evidence of disagreements among the conspirators; and the fact that the conspirators occasionally discussed subjects other than narcotics transactions during the course of telephone conversations intercepted by the government. Taken together, petitioner contends, these circumstances fatally undercut the jury's verdict on the conspiracy count.

Petitioner does not contend that the jury was improperly instructed on the conspiracy count, and it is well established that the question whether the proof shows a single conspiracy or multiple conspiracies is a question of fact for a properly instructed jury. See, *e.g.*, *United States* v. *Teitler*, 802 F.2d 606, 616 (2d Cir. 1986); *United States* v. *Urbanik*, 801 F.2d 692, 695 (4th Cir. 1986); *United States* v. *Dickey*, 736 F.2d 571, 581 (10th Cir. 1984), cert. denied, 469 U.S. 1188 (1985); *United States* v. *Grunsfeld*, 558 F.2d 1231, 1238 (6th Cir.), cert. denied, 434 U.S. 872 (1977). In this case, the evidence, when viewed in the light most favorable to the government, amply supports the

jury's conclusion that petitioner was a party to the single conspiracy charged in the indictment.

Specifically, the government presented evidence showing that petitioner coordinated the effort to import heroin from the Middle East and distribute it in this country (see Pet. App. A8, A10). The evidence established that petitioner, together with Basil Cannata and Anthony P. Restaino, obtained heroin from three suppliers in the Middle East, and that each supplier was aware that the others were also supplying the conspiracy (*id.* at A10). Petitioner and his core confederates employed family members, including petitioner's wife (whose intercepted conversations show a substantial knowledge of and involvement in the conspiratorial activities), petitioner's brothers-in-law (Hani Fraih and Ayman S. Rabadi), and Cannata's girlfriend (Mary "Chicky" D'Agostino), to ferry money and drugs to suppliers and customers. In addition, the conspirators used a series of drug couriers, including the Abdouches (Angeel, her ex-husband Elias, and their son Antwan) to transport the heroin (*id.* at A10-A11).

The government's evidence further showed that the same individuals who were involved in obtaining supplies of heroin for petitioner also were involved in its sale and distribution (Pet. App. A11). For example, Cannata was involved in numerous drug transactions, including receiving drugs from the Jordanian military personnel and selling or attempting to sell drugs to co-conspirator Rafaela "Lydia" Soto, Saverio Schifano, two individuals identified only as "Frankie" and "Ivan," and Jorge Audinot. Maysoun Annabi was involved in the sales to "Frankie" and "Ivan" and Audinot.

The government's evidence also supported the inference that customers and resuppliers such as Nersesian, Pazienza, and Meade, who obtained heroin from the core group,

were aware that other associates of the conspirators were also reselling heroin. For example, Meade assisted many of the conspiracy's sales efforts; Pazienza was aware of problems petitioner was having collecting payment from other customers; and Meade and Pazienza were aware of each other's attempts to find new customers for petitioner.

As the court of appeals held, "[t]he jury reasonably could have inferred from the evidence that there existed over a period of time a single conspiracy to import and distribute heroin consisting of core members who organized and oversaw the importation and distribution, family assistants, interconnected suppliers in the Middle East, couriers who actually transported the heroin, and local redistributors and customers who purchased quantities of heroin" (Pet. App. A13). Even if petitioner's challenges to the evidence regarding peripheral aspects of the conspiracy had merit, they would not undermine the conclusion of the court of appeals as to the sufficiency of the evidence to support the jury's verdict.

4. Petitioner further contends that the district court erred when it failed to sever his trial from that of his co-conspirators. More specifically, he maintains that by making him the "centerpiece" of its conspiracy prosecution, the government forced petitioner's co-defendants to assume petitioner's guilt before the jury in order to distance themselves from the conspiracy (Pet. 54-58). As a result, petitioner contends, he was subjected to increasing prejudice as the trial progressed, and the district court therefore should have severed his trial from that of his co-defendants at some point in the proceedings.

To prevail in challenging the district court's ruling on a motion to sever, petitioner must show that the district court abused its discretion (see, *e.g.*, *Opper* v. *United*

States, 348 U.S. 84, 95 (1954)), and that as a result he suffered substantial prejudice. *United States* v. *Lane*, 474 U.S. 438, 449 (1986); *United States* v. *Dounias*, 777 F.2d 346, 350 (7th Cir. 1985); *United States* v. *Bari*, 750 F.2d 1169, 1177 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985); 1 C. Wright, *Federal Practice and Procedure* § 227, at 854 & nn.2 & 3 (2d ed. 1982) (collecting cases). In this case, petitioner has not shown that he suffered any substantial prejudice.

The court of appeals "carefully reviewed" each of the instances that petitioner cited to support his claim of prejudice and found that petitioner's argument had no factual support (Pet. App. A17-A18). First, the court noted that most of the remarks cited by petitioner were made outside of the presence of the jury (*id.* at A17). In addition, the court observed that other allegedly prejudicial remarks did not mention petitioner (*id.* at A17-A18). For example, petitioner contends that counsel for other defendants assumed petitioner's guilt during their opening statements. Yet, as the court of appeals found, the statements about which petitioner complains alluded only to the strength of the evidence showing a conspiracy and not to petitioner's role in the conspiracy. Similarly, petitioner's argument that he was prejudiced by the introduction of evidence showing heroin activity by co-defendants "who were clearly not acting in conspiracy with petitioner" (Pet. 58) simply restates petitioner's assertion—rejected by the jury—that the evidence did not establish a single conspiracy in this case.

5. Petitioner's final claim is that he did not receive the effective assistance of counsel. He cites his trial counsel's failure to make an opening statement, his failure to

challenge the government's translations of intercepted conversations in Arabic, his failure to obtain full discovery from the government regarding petitioner's prior plea agreement, and—more generally—his failure to develop petitioner's defenses fully (Pet. 59-61). Petitioner contends that counsel's alleged errors and omissions undermined the reliability of the proceeding, and thus failed the second prong of the test this Court laid down in *Strickland* v. *Washington*, 466 U.S. 668 (1984).

The court of appeals considered those and other asserted instances of unprofessional conduct by petitioner's trial counsel and concluded that they fell far short of establishing ineffective assistance of counsel under the *Strickland* test (Pet. App. A54-A58). With regard to counsel's failure to make a opening statement, the court held that trial counsel's decision to waive opening statement "is ordinarily a matter of trial tactics" that allows counsel to assess the government's evidence without committing the defense to a particular strategy (*id.* at A55).

With regard to counsel's alleged failure to challenge the government's translations of the tape-recorded conversations, petitioner does not state that any of those translations were wrong, and in fact he does not even directly assert that his counsel failed to check their accuracy. His only assertion is that no effort "to carefully examine and translate wiretap recordings appears to have been made" (Pet. 61). Presumably, if the government's translations had been inaccurate, petitioner could have advised his counsel of that fact.

Similarly, with regard to the facts pertaining to petitioner's prior cooperation with the government, presumably petitioner was in the best position to know what he did in the course of his cooperation; it is unclear why his lawyer should be faulted for not conducting

"discovery" on that issue. In any event, as the court of appeals observed (Pet. App. A57), counsel filed several motions on petitioner's behalf relating to his cooperation with the government and "vigorously sought to preclude certain tape recordings" as violative of petitioner's cooperation agreement with the government.

With regard to the general assertion that counsel did not press petitioner's defenses with sufficient vigor, petitioner presented those defenses in the course of his own testimony, but the jury found them unpersuasive. In light of the overwhelming strength of the evidence against petitioner, it is not surprising that the jury found him unconvincing. And in light of the strength of the government's case, the court of appeals was correct in concluding (Pet. App. A57) that, even if petitioner's attorney's performance was in some respects inadequate, it could not have affected the outcome of the trial.

Although petitioner reasserts these same arguments before this Court, he points to no reason to disturb the entirely unremarkable holding of the court of appeals. The court below properly applied the *Strickland* test. Petitioner complains that the test should have produced a different outcome in this case, but he does not identify any specific respect in which the court of appeals erred.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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